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CONTRACTS FOR THE BENEFIT OF THIRD PERSONS.

MODERN authorities profess to leave unquestioned the rule that only those can bring suit upon a contract who are parties to it. Where, however, the rights of third persons are involved, cases are numerous in which the strict application of the rule would work injustice. If I make a promise to another, the consideration for which is a matter concerning no one else, but which may incidentally benefit a third person, should he thereby acquire a right to sue me for its breach? If so, must I also remain liable to the promisee, and be subject to the inconvenience—if to nothing else—of two separate actions at the same time for the same debt? On the other hand, if I remit money to another with a request that he pay it over to a third person in satisfaction of my debt to that third person, and the recipient promises upon sufficient consideration to do so, should not he for whose benefit the promise was made, be entitled to recover the amount? Is the promisor anything more or less than a trustee? A maintenance of the rule in its full force, in spite of the occasional hardship upon third persons, would have been far more satisfactory than the present state of the law. But the admission of a single exception formed an entering wedge which materially weakened the power of the rule, and has resulted in a deplorable conflict of reasoning and decision in the authorities. An attempt to reconcile these, or even to explain them, would be a useless task. There is, however, a certain grouping of the cases possible, depending for classification more upon the facts involved than upon the grounds

of the decisions, which will serve to illustrate the law of the subject.

In *Dutton v. Poole*, 1 Vent. 318, s. c. 2 Lev. 210, which, though not the earliest, was long the leading case on the point in England, it was held that a daughter, who was privy neither to the contract nor to the consideration, might maintain an action on a promise made to her father for her benefit. The explanation commonly given bases the decision upon the near relationship of the third person to the promisee, although others have been suggested. This case was frequently affirmed until *Tweddle v. Atkinson*, 1 B. & S. 392, overruled it and established the existing law. Although it would be inaccurate to say that the English cases admit of no exceptions to the rule already mentioned, the exceptions are surrounded by careful restrictions, and there is a strong disposition to adhere strictly to the rule: Dicey on Parties (ed. 1876) p. 81; *Smart v. Chell*, 7 Dowl. 785; *Lilly v. Hays*, 5 A. & E. 548; *Noble v. National Discount Co.*, 29 L. J. 210 (Ex.) 5 H. & N. 225; *Howell v. Batt*, 5 B. & Ad. 506. In the United States, on the other hand, *Dutton v. Poole* would be sustained by the weight of authority; not on account of the relationship, but because the benefit to the daughter was the principal object of the contract: *Meech v. Ensign*, 21 Am. L. R. 608; *Farley v. Cleveland*, 4 Cow. 432; *Hendrick v. Lindsay*, 93 U. S. 143; *Vrooman v. Turner*, 69 N. Y. 280; *Felton v. Dickinson*, 10 Mass. 287.

In fact, so far have some American courts gone in opposition to the English view that it has been held possible for one not a party to the contract to sue upon it although under seal: *Coster v. Mayor*, 43 N. Y. 399; *McDowell v. Laev*, 35 Wis. 171; *Bassett v. Hughes*, 43 Id. 319; *Rogers v. Gosnell*, 51 Mo. 466; *Garvin v. Mobley*, 1 Bush 48; *Huckabee v. May*, 14 Ala. 263.

In Pennsylvania and several New England states, where, although the cases are conflicting, there is no disposition to receive the exceptions in their unqualified form, it is acknowledged that if the promisor receive money from the promisee to be delivered to the third person, the latter may maintain an action: *Blymire v. Boistelle*, 6 Watts 182; *Mellen v. Whipple*, 1 Gray 317. Nor is the right of the third person to sue denied where the contract has for its object a benefit to him, and is made with that intent: *Meech v. Ensign*, *supra*. In most of the states, however, the broad principle, unrestricted and unqualified, is laid down that a plain-

tiff may bring suit on a simple contract to which he is not a party, when it contains a provision for his benefit: Wharton on Contracts (ed. 1882) sect. 787.

No doubt this question of the rights of third persons in such contracts is a difficult and doubtful one. Perhaps that fact explains the conflict of authority; it certainly demands for each of these cases careful and thorough consideration. Whatever the apparent presumption of such a remark, it is believed that many of them have been too hastily decided and many of the opinions too carelessly worded. It is hardly too much to say that authority may be found for almost any view of a given state of facts which counsel or the court may prefer to adopt. The object of this article will therefore be to classify the cases under headings which contain conservative statements of what the weight of authority seems to have settled.

WHERE THE PRINCIPAL OBJECT OF THE CONTRACT BETWEEN THE PROMISOR AND THE PROMISEE IS A BENEFIT TO THE THIRD PERSON HE MAY SUE UPON IT.

The difficulty of determining what is the *principal object* of such contracts is at once apparent. It is only a reasonable presumption that the benefit to himself was the ruling motive in the mind of the promisor, and formed the consideration for the promise. But this need not always be true; the benefit to the promisor may be an unimportant factor in the agreement, or may arise so indirectly that it scarcely appears. Thus in *Felton v. Dickinson*, 10 Mass. 287, the promisee placed his son in the service of the promisor upon an agreement that at the end of the term of service the promisor would pay to the son a certain sum of money, and it was held that the son might recover according to the terms of the agreement. But in *Lawrence v. Fox*, 20 N. Y. 268, the promisee owed to the third person \$300. The promisor borrowed the same amount from the promisee and agreed to pay it over to the third person in satisfaction of the original debt. The latter was held entitled to recover.

As sustaining the above proposition generally, see *Hind v. Holdship*, 2 Watts 104; *Vincent v. Watson*, 6 Harris 96; *Edmundson v. Penny*, 1 Barr 334; *Wynn v. Wood*, 1 Outerbridge 216; *Beers v. Robinson*, 9 Barr 229; *Esling v. Zantzinger*, 1 Harris 50; *Comm. Bk. v. Wood*, 7 W. & S. 89; *Guthrie v. Kerr*, 4

Norris 303; *Kountz v. Holthouse*, Id. 235; *Roth v. Barner*, 12 Weekly Notes of Cases 523; *D. & H. Canal Co. v. Bk.*, 4 Denio 97; *Simson v. Brown*, 68 N. Y. 355; *Farley v. Cleveland*, 4 Cow. 432; 9 Id. 639; *Cumberland v. Codrington*, 3 Johns. Ch. 254; *Barker v. Bucklin*, 2 Denio 45; *Felton v. Dickinson*, 10 Mass. 287; *Frost v. Gage*, 1 Allen 262; *Carnegie v. Morrison*, 2 Met. 381; *Hincey v. Fowler*, 15 Me. 285; *Motley v. Ins. Co.*, 29 Id. 337; *Bohanan v. Pope*, 42 Id. 93; *Railroad Co. v. Cole*, 24 Vt. 33; *Crocker v. Higgins*, 7 Conn. 347; *Steene v. Aylesworth*, 18 Id. 244; *Clapp v. Lawton*, 31 Id. 95; *Thompson v. Thompson*, 4 Ohio St. 353; *Putney v. Farnham*, 27 Wis. 187; *Kollock v. Parcher*, 52 Id. 393; *Davis v. Calloway*, 30 Ind. 112; *Carter v. Zenblin*, 68 Id. 436; *Fisher v. Wilmoth*, Id. 449; *Association v. Magnier*, 16 La. Ann. 338; *Carver v. Eads*, 65 Ala. 190; *Lucas v. Chamberlain*, 8 B. Monroe 276; *Bett v. McLaughlin*, 12 Mo. 433; *Corl v. Riggs*, Id. 430; *Smith v. Mayberry*, 13 Nevada 427; *Green v. Richardson*, 4 Colorado 584.

In those states, however, in which the rule is strictly construed, it is held that the interest of the third person must be *exclusive* to entitle him to recover. In *Blymire v. Boistle*, 6 Watts 182, SERGEANT, J., makes the distinction clear: "Where one person contracts with another to pay money to a third or to deliver over some valuable thing, and such third person is thus the only party in interest, he ought to possess the right to release the demand or recover it by action. But when a debt already exists from one person to another, a promise by a third person to pay such debt, being for the benefit of the original debtor, and to relieve him from the payment of it, he ought to have a right of action against the promisor for his own indemnity; and if the promisor were also liable to the original creditor, he would be subject to two separate actions at the same time, for the same debt, which would be inconvenient and might lead to injustice." In the one instance the promisor becomes the custodian and trustee of a fund actually belonging to the beneficiary. In the other he undertakes to pay some sum or do some act, in consideration of a benefit conferred on himself. In Pennsylvania the distinction as thus stated, in spite of conflict, has been kept in view. *Cummings v. Klapp*, 5 W. & S. 511; *Ramsdale v. Horton*, 3 Barr 330; *Finney v. Finney*, 4 Harris 380; *Campbell v. Lacock*, 4 Wright 448; *Morrison v. Beckey*, 6 Watts 349; *Robertson v. Reed*, 11 Wright 115;

Torrens v. Campbell, 24 P. F. Smith 470; *Guthrie v. Kerr*, 4 Norris 303; *Miss. C. Railroad Co. v. Southern Railroad Association*, 8 Phila. 107. It is also recognised in *National Bank v. Grand Lodge*, 98 U. S. 123.¹

AGENCY.—A portion of the court in the case of *Lawrence v. Fox*, *supra*, considered that the promise was to be regarded as made to the third person through the medium of the promisor as his agent, whose conduct he could ratify when it came to his knowledge, though taken without his being privy thereto, and this view has met with some favor in other cases. *Treat v. Stanton*, 14 Conn. 445; *Meech v. Ensign*, *supra*; *Johnson v. Collins*, 14 Iowa 63. To call upon the law of agency to supply a supposed deficiency in the law of contracts affords no standing ground. It is said that the promisor is the agent of the third person whose acts the latter can ratify, whereas directly the reverse of this is true. The promisor is the agent of the promisee, if of anybody. The assets in his hands are the property of the promisee and subject to his control; their loss would not fall upon the third person. The contract may be rescinded and the third person cannot complain: *Davis v. Calloway*, 30 Ind. 112. True, when the third person has acted upon the promise the parties are bound: *Bassett v. Hughes*, 43 Wis. 319. But the reason for this will be discovered not in the law of agency but that of contracts

SURETYSHIP.—Where the facts warrant an inference that the promisee, by his contract with the promisor, became the surety of the latter: *Blyer v. Monholland*, 2 Sandf. Ch. 478; *Curtis v. Tyler*, 9 Paige 432; *King v. Whitely*, 10 Id. 465; *Crawford v. Edwards*, 33 Mich. 354; *Bishop v. Douglass*, 25 Wis. 696; *Klapworth v. Dressler*, 2 Beas. N. J. Ch. 62. The authorities are agreed that this ground is only tenable in equity. Even here, however, the effect is to make a contract for the parties different from that which they intended. Certainly there is no express contract of suretyship;—contrary to the fact, the court must assume a contract created not by the acts of the parties, but by the operation of a rule of law upon those acts. The promisor agrees with the promisee to pay the debt, and thereby, as between themselves, becomes the principal debtor. But the promisee not being discharged is also liable to the third person. If compelled to pay he is a surety only in this, that he has a right to call upon the promisor to

indemnify him. But all this does not affect the third person and he is not a party to it. What interest has he in the transaction, and in what consists his equity? To make that relationship available to him it is necessary not only to bring him into contract relations with the other parties, but also to reverse the positions of the principal and surety and make the promisor the surety instead of the principal. According to what rule of law can this be done? By what process of reasoning can it be vindicated? This doctrine, and the exception to the rule, cannot both stand. If the promisee is a surety for the promisor, who has assumed payment of the debt, then, failing to recover from the promisor, the third person has a recourse over against the promisee who would thus be compelled to pay his debt twice. Further, the only reasonable position which the exception to the rule can occupy is that which would regard the bringing of suit by the third person against the promisor as evidence of the former's assent to accept the promisor as his debtor, and a consequent extinguishment of the promisee's liability.

NOVATION.—*Where, in the contract between them, the promisor assumes the promisee's debt he becomes liable by substitution or novation.*

(a.) *Conveyance of property subject to a mortgage which is assumed by the grantee.*

These cases rest upon the following argument: B. is indebted to A. B. sells land to C., who agrees, instead of paying the price in full, to assume the debt, or to become A.'s debtor in lieu of B. If A. were present assenting, the novation would be consummated on the instant; but A., being absent, learns of the agreement afterward, and assents to it by bringing his action. Why may not the novation be completed by the assent so given as effectually as if given on the instant? If it be said that in order to create a privity between A. and C., the assent must be mutual, the answer is that C. had already assented, and there was nothing wanting but A.'s assent to perfect the novation. To reach such a conclusion it is only necessary to make certain presumptions which are so appropriate to the nature of the transaction that the law can readily allow them: *Urquhart v. Brayton*, 12 R. I. 169; *Merriman v. Moore*, 9 Norris 78; *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253; *Crowell v. Currier*, 27 N. J. Eq. 152; *Campbell v. Smith*, 71

N. Y. 26; *Burr v. Beers*, 24 Id. 178; *Norwood v. DeHart*, 30 N. J. Eq. 412; *Crowell v. Hospital*, 12 C. E. Green 650; *Heim v. Vogel*, 69 Mo. 529; *Fitzgerald v. Barker*, 70 Id. 685; *Day v. Patterson*, 18 Ind. 114; *contra*, *Meech v. Ensign*, 21 Am. L. R. 608; *King v. Whitely*, 10 Paige 465; *Trotter v. Hughes*, 12 N. Y. 74; *Garnsey v. Rogers*, 47 Id. 233; *Page v. Becker*, 31 Mo. 467. But it is the very making of these presumptions which constitutes a strong objection to this class of cases. Three essential elements of a novation are wanting: 1st. A contract drawn up in accordance with the intention of the parties. Certainly to give the mortgagee additional security was not their object; to thus interpret it is to make a contract for them. 2d. The consent of the mortgagee to accept the promisor as his debtor. 3d. The discharge of the original debtor.

(b) *Where one of two partners assumes the payment of firm debts as part of the consideration of a contract with the retiring partner, firm creditors may not sue the obligors on the partner's bond.*

Here it is considered that there is no privity of contract between the promisor and the creditors. The promise was not made to them nor for their use and benefit. No consideration moved from the creditors nor was a trust fund created for their benefit: *Shoemaker v. King*, 4 Wright 107; *Campbell v. Lacock*, Id. 448; *Torrans v. Campbell*, 24 P. F. Smith 470; *Merrill v. Green*, 55 N. Y. 270; *Manny v. Frasier*, 27 Mo. 419. But in Pennsylvania a distinction has been drawn between this case and that where the suit is by the creditors of the old firm against the partners who continue the business, in the latter case they may recover: *Bellas v. Fagely*, 7 Harris 273; *Vincent v. Watson*, 6 Id. 96; *Campbell v. Lacock*, 4 Wright 452; *Wynn v. Wood*, 1 Outerbridge 216. See also, *Devol v. McIntosh*, 23 Ind. 529; *Lehow v. Simonton*, 3 Col. 346.

TRUST FUND.—*Where by the contract between the promisor and the promisee, the former becomes a trustee for the third person.*

There seem to be very good reasons for allowing a recovery by the third person in such cases. It must be remembered that the action is not brought upon the express promise which passes between the contracting parties, but upon an implied promise to the

third person from the promisor. The promisor then has become the possessor of assets which in equity and good conscience belong to the third person; the right of the latter is undoubted, and certainly none exists in the former. Why then should there be no recovery? The law supplies the want of privity by the fiction of an implied promise, and adjusts the rights of the parties according to a standard which by their own acts they have adopted: *Fleming v. Alter*, 7 S. & R. 295; *Justice v. Tallman*, 5 Norris 147; *Fitch v. Chandler*, 4 Cush. 254; *Arnold v. Lyman*, 17 Mass. 400; *Hall v. Marston*, Id. 575; *Putnam v. Field*, 103 Id. 556; *Sailly v. Cleveland*, 10 Wend. 156; *Ætna Bank v. Fourth Nat. Bank*, 46 N. Y. 82; *Draughan v. Bunting*, 9 Ired. 10; *Brown v. O'Brien*, 1 Rich. (S. C.) 268; *Cross v. Truesdale*, 28 Ind. 44; *Donkersley v. Levy*, 38 Mich. 55. On the other hand it is urged that the mere delivery of money to the promisor who agrees to pay it to a third person does not constitute an *agreement* to pay to the third person within any definition of that term. The promisor derives no benefit from the receipt of the money which still remains the property of the promisee. Should it be lost without the fault of the promisor, the loss falls upon the promisee, not upon the third person. The debt of the promisee is not extinguished by a delivery to the promisor and the latter is in no sense the agent of the third person. He receives the money as the agent of the promisee, who may at any time recall it and divert it to another use: *Bigelow v. Davis*, 16 Barb. 561; *Warren v. Batchelder*, 15 N. H. 129.

Where the circumstances warrant an inference either—

- a. That the third person accepts the promisor as his trustee; or,*
- b. That a bargain, more or less direct, has been entered into between the third person and the promisor.*

In *Brewer v. Dyer*, 7 Cush. 337, A. leased property to B. Before the lease had expired C., with the knowledge of A., agreed with B. that he would take the premises and pay rent, &c., to A. A. sued C. in assumpsit, and it was held that the agreement given by C. to B. did not amount to a legal assignment of the lease, but that A. was entitled to recover the rent, for the remainder of the term, from C., as being a promise made to B. for A.'s benefit: see, also, *Mellen v. Whipple*, 1 Gray 317. In *Wyman v. Smith*, 2 Sandf. 331, A. sent money to B., with instructions that he pay it to C. C. called upon B., who promised to pay it to C. C. was

held entitled to recover from B.: *Todd v. Tobey*, 29 Maine 219; *Grover v. Sims*, 5 Black 498; *Weston v. Barker*, 12 Johns. (N. Y.) 276; *Krentz v. Livingston*, 15 Cal. 345.

Where the promisor as part of the consideration of a contract of sale assumes a debt of the promisee to a third person.

In *Huckabee v. May*, 14 Alabama 263, A. was indebted to B. in the sum of \$4000, and to C. in the sum of \$400. A. executed and delivered to B. a deed conveying land and negroes by which B. covenanted in consideration therefor, to release his own debt and to pay A.'s debt to C. and those to various other parties. C. sued B. in assumpsit and was allowed to recover. The court proceeded upon the ground that the weight of authority allowed the recovery by a third person on a promise to pay a sum of money made for his benefit when the contract was by parol. Had the conveyance been of a sum of money under similar conditions the third person might have recovered in an action for money had and received. The acceptance of the property was not an agreement on the part of the promisor to sell it as a trustee for that purpose, but an admission that he had the money to pay the creditors of the promisee. In other words, by the terms of the contract the land was to be regarded as money, and the authorities show that where the consideration is treated by the parties as money an action for money had and received will lie: *Ainslie v. Wilson*, 7 Cowen 662; *Pinckhard v. Banks*, 13 East 20. The property was not charged with the payment of the debts, but the promisor stipulated to pay them. The very decree that a court of equity would render, would be an agreement in favor of sustaining the action at law. It could not be to subject the property to sale, as a trust fund, but would simply be that the promisor should pay to the third person a sum of money, because in equity and good conscience he owed it to him. As the parties had treated the sum as money due the third person from the promisor the former might recover at law. Most of the cases, however, prefer to regard the promisor as a trustee, and the debt, payment of which he has assumed, as a part of the purchase-money, and this would seem to be the better view. *Ellwood v. Monk*, 5 Wendell 235; *Snell v. Ives*, 85 Ill. 279; *Beasley v. Webster*, 64 Id. 458; *Sanders v. Clason*, 13 Minn. 379; *Jordan v. White*, 20 Id. 91; *Welsh v. Railroad Co.*, 25 Id. 314; *Bassett v. Hughes*, 43 Wis. 319; *Morgan v. Overman S. M. Co.*, 37 Cal. 536;

Johnson v. Collins, 14 Iowa 63; *Joslin v. N. J. Car-spring Co.*, 7 Vroom 141. On the other hand it is not to be denied that to entitle a third person to recover there must be an extinguishment of the original debt. What can operate as such an extinguishment except payment, or, what is equivalent to it, the agreement of the creditor to accept the promisor as his debtor? In most of the cases the only evidence of the creditor's acceptance is the bringing of his suit, and in some this is held not to be sufficient. *McLaren v. Hutchinson*, 18 Cal. 82; *Butterfield v. Hartshorn*, 7 N. H. 345.

The want of harmony in the reasoning of the authorities is an element of weakness. But the difference is more apparent than real; it lies rather in the grounds for the conclusion than in the conclusion itself. One may be excused a feeling of surprise that two judges who had parted company after their statements of fact should meet again upon the decree. The frequent repetition of this phenomenon indicates that there is here some underlying principle, but there is little to aid in its discovery. An examination of the cases will show that in the majority of them when the contract was founded upon good consideration one of two results followed. The promisor assumed the payment of another's debt, or became the possessor of another's assets. But while this is sufficiently evident, circumstances may make it difficult to determine in a given case which of these results follow. For example, the cases which have been classed under the headings *Novation* and *Trust Fund*, embrace, in the main, three states of facts: 1. A conveyance of land subject to a mortgage which is assumed by the grantee; 2. A transfer of partnership assets from an old to a new firm, with an assumption on the part of the latter of the debts of the former; 3. An assumption by the vendee of a debt of the vendor to a third person, as part of the consideration of a contract of sale. It then becomes a nice question to determine whether the promisor has assumed a debt, merely, or whether the debt, being made part of the purchase-money, may not be considered assets in his hands. This distinction is an important one in such states as Pennsylvania, where the promise to pay another's debt cannot be enforced by a third person when the promise is for the benefit of the original debtor (the promisee): *Blymire v. Boistle*, *supra*. An application of the test laid down by SERGEANT, J. (*ante*), yields no

satisfactory results, for this state of facts seems clearly distinguishable from any ordinary promise to pay another's debt. While it may be acknowledged, in accordance with many able opinions, that if B. promises A. to pay A.'s debt to C. without more, the latter cannot recover, it does not follow under the authorities, that when B. purchases from A., and instead of paying the purchase-money in full, assumes a debt to C. which is thus made part of the consideration, C.'s recovery is barred because B.'s promise is for the benefit of A. At least this is true outside of Pennsylvania, where the distinction there drawn is not enforced.

The tendency of the later cases is unmistakable, the rule as applied to these contracts is buried beneath the exceptions, and the chief regret now should be that so many courts waver between the rule and the exceptions. An attempt to resist the current seems to be a useless waste of energy, because the question is less one of principle than of expediency. Abstractly considered, the case would stand thus: B. makes, on good consideration, a promise to A. for the benefit of C., and receives from A. certain assets. These assets by the gift of A. are, in justice and equity, the property of C. The objection to C.'s recovery is not that it will work injustice, but that it contravenes a rule of law. But that rule was framed for the protection of the very persons who are here concerned. If an exception to the rule equally protects their rights, and is in itself more expedient, why enforce the rule? The courts seem now to have reached the point where the expediency of the exceptions is recognised, but, owing to conflicting interests and other complications, their limits have not been clearly defined. Future decisions will probably serve to weed out many of the untenable theories mentioned above, upon which those doctrines are supposed to be founded, and this once accomplished, the difficulties in the way of the other task will, in great measure, disappear.

JNO. HOUSTON MERRILL.

Philadelphia, Pa.
